IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.110 OF 1986

Pandharinath Amrutrao Lambkane
(since deceased by his heirs)
1. Hari Pandharinath Lambkane
2. Smt.Sojarabai Anantrao Pawar
3. Sau. Yamunabai Dhondiram Pawar
4. Bhiwarabai Govardhan Garad
5. Indumati Saudagar Awatade
6. Narayan Pandharinath Lambkane ...Appellants

Versus

1. Mahatabbi @ Bahitababi w/o Maulasaheb Shaikh
(since deceased by her heirs)
1a. Razak Yakub Mulani
1b. Babulal Yakub Mulani
2. Manohar Bhau Khilare
3. Mohamed Yakub Mulani
(delted vide order dt.26-9-86 passed
in C.A.No.682/86 by the Additional Registrar)
4. Razak Yakub Mulani
5. Babulal Yakub Mulani ...Respondents

Shri K.Y.Mandlik for the Appellants
Shri M.R.Katikar for Respondent No.2.

CORAM: A.S.OKA, J.

DATED: JULY 15, 2004.

ORAL JUDGMENT :

1. This Second Appeal was admitted on 21st February 1986. While admitting the Appeal this Court observed that "whether Defendants Nos.3 to 6 have claim to any interest of deceased Mahibubbi raises a question of law."

2. I have heard the Counsel appearing for the parties on the said substantial question of law. The Second Appeal is by legal representatives of the original Plaintiff. The Respondents are the original Defendants.

3. According to the case of the Appellants on 10th September 1968 the Defendant No.1-Respondent No.1 Mahatabbi daughter of Aminabi and Mahabubbi sold the suit land to the Respondent No.2 by registered sale deed. On 20th June 1969 the Respondent No.1-Mahatabbi obtained an agreement for sale in respect of the suit land from the Respondent No.2. The Respondent No.1 filed a suit for specific performance against the Respondent No.2 and the said suit was decreed. A direction was given against the Respondent No.1 to deposit a sum of Rs.6500/- within a period of six months and the Respondent No.2 was directed to execute the sale deed in favour of the Respondent No.1.

4. The Respondent No.1 executed an agreement for sale in favour of the original Plaintiff in respect of the suit land on 13th January 1972. The price was fixed at Rs.7000/-. It is the case of the original Plaintiff that a sum of Rs.6500/- was paid by him to the Respondent No.1 towards the price and the

Respondent No.1 deposited Rs.5500/- in the Court in Regular Darkhast No.87 of 1972 filed by her for execution of the decree for specific performance passed against the Respondent No.2. It is the case of the Plaintiff that the Respondent No.1 obtained possession of the suit land on 17th October 1975 and thereafter withdrew the Darkhast without getting the sale deed executed from the Respondent No.2. As the Respondent No.1 refused to convey the suit land to the original Plaintiff on the basis of the suit agreement, present suit was filed for specific performance.

5. The Respondent No.1 resisted the suit by filing written statement. One of the contentions raised by the Respondent No.1 was that the suit agreement was executed by way of security for the amount advanced to the Respondent No.1. A contention was also raised that the Respondent No.1 had only one half share and other one half share was of Mahabubbi. An application was filed by the Respondent No.2 at Exh.43. In the said Application the Respondent No.2 stated that a sum of Rs.5500/- has been deposited in the execution proceedings of the decree passed in favour of the Respondent No.1. In the said Application the Respondent No.2 stated that he was still ready and willing to execute the deed of

conveyance. The Respondent Nos.3 to 6 who are the legal representatives of Mahabubbi filed written statement and contested the suit.

6. The learned Trial Judge passed a decree for specific performance in favour of the original Plaintiff. Both the Respondent Nos.1 and 2 were directed to execute the conveyance in favour of the original Plaintiff.

7. An Appeal was filed by only the Respondent No.1-Defendant No.1. It is pertinent to note that the Trial Court specifically framed issue No.8 which reads thus :

. "Do the Defendants Nos.3 to 6 prove that they have got half-interest in suit property as the heirs of Mahabubbi ?"

The said issue was answered against the original Defendant Nos.3 to 6 i.e. the Respondent Nos.3 to 6. The Appeal preferred by the Respondent No.1 was allowed by setting aside the Decree of specific performance and the Appellate Court substituted the said decree by directing the Respondent no.1 to refund a sum of Rs.6500/- with interest to the original Plaintiff. The Appellate court held that the original Plaintiff proved the execution of the

suit agreement dated 13th January 1972 and that he had paid a sum of Rs.6500/- as earnest money to the Respondent No.1. The Appellate Court negatived the contention of the Respondent No.1 that the suit agreement was executed by way of security for repayment of loan. The Appellate Court, however, held that the Respondent Nos.3 to 6 have proved that they have right, title or interest in the suit land by virtue of being the legal representatives of Mahabubbi.

8. The learned Counsel appearing for the Appellants Shri Mandlik submitted that original Defendant Nos.3 to 6 (i.e. the Respondent Nos.3 to 6) had not challenged the decree for specific performance though a categorical finding was recorded by the Trial Court that the said Defendants have no right, title or interest in the suit land. He submitted that the Appellate Court could not have recorded a finding in favour of the Respondent Nos.3 to 6. He submitted that even assuming that the sale deed executed by the Respondent No.1 and deceased Mahabubbi in favour of the Respondent No.2 was valid, the Respondent No.2 had executed an agreement for sale in respect of the suit land in favour of the Respondent No.1 and there was a decree for specific performance passed in favour of the Respondent No.1. He pointed out that

by filing application at Exh.43 the Respondent No.2 has recorded his readiness and willingness to convey the suit land as a sum of Rs.5500/- was deposited in the execution proceedings filed by the Respondent No.1. The learned Counsel also pointed out that the Decree for specific performance was passed in favour of the Respondent No.1 in a suit filed by her against the Respondent No.2 which was not challenged by the Respondent No.2.

9. None appeared for the Respondent Nos. 1,3,5 and 6 though the Appeal was adjourned on more than two occasions. The learned Counsel for the Respondent No.2 opposed the submissions made by the learned Counsel for the Appellant and contended that the Respondent No.2 had no privity of contract with the Original Plaintiff and therefore the Decree could not have been passed against the Respondent No.2.

10. I have carefully considered the submissions made by both the Counsel. As pointed out earlier the Trial Court recorded a categorical finding that the Defendant Nos.3 to 6 who were claiming through Mahabubbi failed to prove that they had one half share in the suit land in their capacity as heirs of Mahabubbi. The Trial Court recorded a finding that the Respondent No.1 was alone full owner of the suit

land. Thus, the decree was passed by the Trial Court for specific performance after holding that the Respondent No.1 was the sole owner of the suit land. Inspite of this position the Defendant Nos.3 to 6/Respondent Nos. 3 to 6 did not challenge the decree by preferring any Appeal. It does not appear from the Judgment of the Appellate court that any submission was made on behalf of the Defendant Nos. 3 to 6/Respondent Nos.3 to 6 that the finding recorded by the Trial Court on Issue No.8 was incorrect. It is true that the Appellate Court had power under Order XLI Rule 33 of Code of Civil Procedure, 1908 to set aside the finding recorded against the Respondents who had not challenged the Decree. However, said power in my opinion could not have been exercised in favour of the Respondent Nos.3 to 6 who were not diligent about their alleged rights.

11. Even if the case made out by the Respondent No.1 is accepted, it is an admitted position that the Respondent No.1 and deceased Mahabubbi has sold the suit land by registered conveyance in favour of the Respondent No.2. The Respondent No.2 had agreed to sell the suit land only in favour of the Respondent No.1 and the Decree for specific performance was passed in favour of the Respondent No.1 on the basis

of the said Agreement which is not challenged by the Respondent No.2. As stated earlier the Respondent No.1 filed execution proceeding and deposited consideration as per the decree. It appears that the Respondent No.1 raised the contention that the sale deed executed in favour of the Respondent No.2 was hit by provisions of Bombay Prevention of Fragmentation and Consolidation of Holdings Act,1947 and obtained possession of the suit land from the Tahsildar. After obtaining possession from the Tahsildar she withdrew the execution proceedings. In the examination-in-chief the Respondent No.1 has stated that after receiving a sum of Rs.6500/- from the Plaintiff she deposited a sum of Rs.5500/- in the execution proceedings. It is to be noted here that the case of the Respondent No.1 is that the suit agreement was executed only by way of security. The said case has been discarded by the Courts below. In this Second Appeal no grievance has been made as regards the said finding recorded against the Respondent No.1. Thus, it appears that after taking a sum of Rs.6500/- from the original Plaintiff the Respondent No.1 deposited a sum of Rs.5500/- in execution proceeding. It is obvious that the Respondent No.1 did not prosecute the execution proceeding after obtaining possession of the suit land only to defeat the suit agreement.

12. In so far as the Defendant No.2 is concerned, apart from the Application Exh.43, even in his cross examination he stated that he was ready to execute the conveyance on the basis of decree of specific performance.

13. Considering all these facts it was not open for the Respondent No.1 to contend in the Appeal before the District Court that she had only one half share in the suit land and she was not competent to execute the conveyance in favour of the original Plaintiff. In so far as the Respondent No.2 is concerned, it cannot be disputed that by virtue of sale deed executed in his favour by the Respondent No.1 and deceased Mahabubbi, he became absolute owner of the suit land. In the present suit there was a decree for execution of the sale deed passed by the Trial Court against both the Respondent Nos.1 and 2. The said Decree was not challenged by the Respondent No.2. It is, thus, obvious that the decree for specific performance passed in the present suit of the Appellant against the Respondent No.2 who was the owner of the suit land has attained finality. The Respondent No.1 had deposited the balance consideration of Rs.5500/- payable to Respondent No.2 in execution proceeding after taking the said amount

of Rs.6500/- from the original Plaintiff. In the circumstances, the Appellate Court committed an error by setting aside the decree passed in the Appeal preferred by the Respondent No.1.

14. In the circumstances, this Appeal must succeed and the decree for specific performance passed by the Trial Court will have to be restored. However, by exercising power under Order XLI Rule 33 of Code of Civil Procedure, 1908, the Respondent No.2 will have be permitted to withdraw a sum of Rs.5500/- deposited in Regular Darkhast No.87 of 1972.

15. Hence, I pass the following order :

. Second Appeal is allowed with costs. The impugned Judgment and Decree passed by the Appellate Court is quashed and set aside. The Decree passed by the Trial Court is restored. The Respondent No.2 is permitted to withdraw a sum of Rs.5500/- deposited in the Regular Darkhast No.87 of 1972 after sale deed is executed in favour of the Appellants.

JUDGE